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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Tillman Corporation,
Petitioner,

v.

The Fidelity & Casualty Company of New York,
Respondent.

Petition for a Writ of Certiorari
To The United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

Unequivocal and consistent Indiana case law holds that once an insurance policy is issued, the insurance broker becomes the agent of the insurer, not the insured. The district court and the Seventh Circuit both failed to apply the Indiana precedent. Instead, they relied on a statement in an agency handbook, contrary to Indiana law, and found that an insurance broker who procures a policy through an assigned risk pool is the agent of the insured.

The questions presented for review are:

1. Whether the federal courts, sitting in diversity, were obligated to follow the clear line of Indiana state precedent directly addressing the main issue of the case, which is whether an insurance agent is an agent of the insurer or the insured?

2. Whether the Seventh Circuit erred in stating that the court could give deference to the agency handbook under the *Chevron* Doctrine, which allows a court to give deference to an agency interpretation of a federal statute when Congress has not spoken on the issue?

STATEMENT PURSUANT TO RULE 29.6

Tillman Corporation has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Tillman Corporation, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 112 F.3d 302 (7th Cir. 1997), and is reprinted in the Appendix hereto at pages A1 to A6. The order and opinion of the United States District Court for the Northern District of Indiana is unreported, but is reprinted in the Appendix at A7 to A19.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on April 24, 1997. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

No statutory or constitutional provisions are involved in this case.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 (diversity jurisdiction). Tillman Corporation ("Tillman") is an Indiana Corporation with its principal place of business in Indiana, and Fidelity and Casualty ("Fidelity") is a New Hampshire corporation with its principal place of business in New York.

The Indiana Supreme Court and the Indiana Appellate Courts have held, consistently and unequivocally for nearly ninety years, that an in-

surance broker becomes the agent of the insurance company, not the insured, once the insurance company issues the policy. Both the district court and Seventh Circuit Court of Appeals recognized the Indiana precedent, yet both courts decided, contrary to Indiana law, that an insurance broker, who procures a policy through an assigned risk pool, was the agent of the insured, rather than the insurer. Since the case arose in federal court, a federal court sitting in diversity is bound to follow the law of the state in which it sits. Both courts, however, abandoned the Indiana case law and relied upon a statement in an agency handbook which, as the Court of Appeals explicitly recognized, did not have the force of law.

In 1990, Tillman contacted Elmer Layden of Elmer Layden, Inc. (collectively "Layden"), an insurance agency, to obtain an insurance policy for workers compensation coverage. Layden prepared and submitted an application for insurance, along with a check written by Tillman for the initial premium of $3,303, to the Indiana Compensation Rating Bureau ("Bureau"). The Bureau manages an assigned risk pool which allows new companies to obtain workers compensation insurance. The Bureau then selects an insurer from the pool who does business in Indiana to issue the policy as that insurer would normally do for any of its Indiana customers.

Acting upon the application for insurance and Tillman's initial premium submitted by Layden, Fidelity issued a workers compensation insurance policy to Tillman and sent an agent's commission check to Layden. Tillman's initial premium was based on the assumption that Tillman's payroll would be approximately $150,000 for the year. In actuality, its payroll swelled to $6,000,000 by the end of the project. Since Tillman recognized the large difference from its original premium estimate, it used Fidelity's interim premium calculation worksheets, which Fidelity supplied to Layden, to determine its weekly or bi-weekly premiums. In a good faith effort to avoid a high premium at the year-end audit, Tillman then returned the completed Fidelity interim premium calculation worksheets to Layden along with installment checks for the prepaid workers compensation premiums.

Over the next several months, on a weekly or bi-weekly basis, Tillman paid Layden over $187,000 in installments of policy premiums. When Layden accepted the premium checks from Tillman, Layden expressly told Tillman that he was accepting the premium payments on behalf of Fidelity and that he would forward the payments. However, Layden only conveyed $9,900, of the $187,000 that Tillman paid, to Fidelity. Layden kept the rest and is now insolvent and incarcerated.

Fidelity never informed Tillman that the initial premium was too low or even that it would owe more at year's end, even though from January to September 1991, Fidelity paid 113 workers compensation claims on 89 employees totaling $74,000. Regardless of the claims, it was not until six months after the policy expired that Fidelity informed Tillman that it had not received any payments and that Tillman owed approximately an additional $127,000. Fidelity's calculation occurred only after Layden informed the insurance company that Tillman's construction project was finished and someone better get to Tillman to do an audit "in a hurry."

When Tillman asserted that it had already paid over $187,000 in premiums and expected a refund, Fidelity commenced this action against Tillman for the "unpaid" premiums. Tillman argued that it had fulfilled its duty by remitting all required premium payments to Layden—who according to Indiana law—was Fidelity's agent. Fidelity, however, claimed that Layden was Tillman's agent, not Fidelity's.

Although the district court, in its order granting summary judgment to Fidelity, acknowledged that under Indiana law a broker who prepares an application for insurance is deemed the agent of the insurer once the policy is issued, the court granted summary judgment in favor of Fidelity and denied Tillman's motion for summary judgment. A19. The court stated that Tillman failed to prove that Layden was an agent of Fidelity. A19. Rather than rely on the clear line of Indiana precedent, the court relied on a statement in the Bureau's handbook which stated:

> Important note to the [agent]: Remember, although you have an important role under the Plan, you are not a contract agent or agency of the servicing carrier. You have no authority from the servicing carrier to bind or cancel coverage or to otherwise act within such agency relationship. Unless a legal finance agreement exists which assigns cancellation or premium refund collection rights to a third party, all premium transactions are strictly between the servicing carrier and the employer as a policyholder and you are not a party to that contract. A servicing carrier may give you certain authority, such as permission to issue certificates of insurance, but such rights are not to be routinely assumed by [an insurance agent].

Fidelity and Cas. Co. of New York v. Tillman Corp., 112 F.3d 302, 305 (7th Cir. 1997); A4, 13. There is no evidence that Tillman ever received this handbook. The agency statement blatantly misstated Indiana law, and the Indiana legislature has made no move to enact this policy into law. Although the handbook does state that an insurance company may

give the insurance agent certain authority, the district court still found that the fact Layden supplied Tillman with weekly Fidelity worksheets was not an indication that Layden was Fidelity's agent, regardless of the long-standing Indiana precedent right on point. A16.

The Seventh Circuit followed the district court in relying on the Bureau's handbook. *Tillman Corp.*, 112 F.3d at 305; A4. Although it also acknowledged Indiana's clear line of precedent favoring Tillman at the beginning of its opinion, the Court of Appeals felt compelled to grant deference to the agency handbook, even though it explicitly noted that it was not "a rule with the force of law." *Id.* at 304-05; A4. Regardless of this recognition, the Court of Appeals used the handbook as a basis for affirming the district court. It acknowledged Tillman's wise efforts to pre-determine the amount of its insurance premiums but concluded by stating, "Tillman brought this problem on itself by unnecessarily sending large sums of money to a crook." *Id.* at 306; A6.

The Court of Appeals analogized the situation to Tillman sending payments to John Gotti with the expectation that Gotti was Fidelity's agent. *Id.* at 304; A3. However, this situation is clearly different. Tillman was completely innocent in its dealings with Layden and had no idea Layden—a state-licensed reinsurance broker—was not depositing its premiums with Fidelity. Instead, Tillman was attempting in good faith to pre-pay its insurance premiums once it realized that its payroll far exceeded its initial calculation.

Due to the blatant inconsistencies between the federal court's opinion sitting in diversity and clear Indiana precedent, the Court should reverse the Seventh Circuit and find that Layden was acting as the agent of Fidelity, not Tillman. As the Seventh Circuit recognized, "Indiana has a simple rule. An intermediary in the insurance business is the agent of the insured while shopping for a policy, and the agent of the insurer after a policy issues." *Id.* at 304; A2–3.

On the basis of this simple Indiana rule, this Court should reverse the Seventh Circuit, remand, and direct that judgment be entered in favor of Tillman. 28 U.S.C. § 2106 (1997).

REASONS FOR GRANTING THE PETITION

I. A FEDERAL COURT SITTING IN DIVERSITY MUST FOLLOW THE LAW OF THE STATE IN WHICH IT SITS AND THEREFORE MUST FOLLOW THE CLEAR INDIANA CASE LAW WHICH RECOGNIZES THAT AN INSURANCE BROKER IS THE AGENT OF THE INSURER ONCE A POLICY IS ISSUED.

A. The Seventh Circuit, Sitting in Diversity, Was Bound to Follow Indiana Precedent When Deciding Whether Layden Was an Agent of the Insurer or the Insured.

It is a well known principle that federal courts are bound to recognize an established rule of state law when the state law is sufficiently conclusive and established with finality. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Although there is unwavering and unequivocal Indiana case law governing the agency status of an insurance broker, the Seventh Circuit chose not to follow the state precedent and relied instead upon a handbook published by the Bureau which did not have the force of law. The Court should not force Tillman, the innocent victim, to pay its insurance premiums twice. The Court of Appeals was bound to apply the state law clearly recognizing that an insurance broker is the agent of the insurer once the insurer issues its policy.

The *Erie* doctrine, which has governed federal courts for nearly sixty years, states:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. . . . Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78. A federal court sitting in diversity is bound to follow a decision of the highest court of a state unless it is powerfully convinced that the state court would overrule that opinion at the first opportunity. *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987). Since Indiana has followed the same principle regarding agency since 1918, there is no indication that the state was in any position to change from

the existing law. *See Johnson v. Schrepferman*, 119 N.E. 494, 495 (Ind. Ct. App. 1918) (announcing the well-recognized principle that an insurance broker is an agent of the insurer).

The Indiana Supreme Court recently stated that "the application for and issuance of an insurance policy establishes the broker as the agent of the insurer." *Benante v. United Pac. Life Ins. Co.*, 659 N.E.2d 545, 547 (Ind. 1995). The *Benante* rule merely reiterated the rule previously decided in a long line of Indiana cases holding the same way. *See Plumlee v. Monroe Guar. Ins. Co.*, 655 N.E.2d 350, 357 (Ind. Ct. App. 1995); *Callis v. State Auto. Ins. Co.*, 579 N.E.2d 129, 131 (Ind. Ct. App. 1991) (stating that once "the broker makes application for insurance and the insurance policy is issued, the broker is the agent of the insurer and can bind it within the scope of his authority"); *Aetna Ins. Co. of the Midwest v. Rodriguez*, 517 N.E.2d 386, 388 (Ind. 1988); *Johnson*, 119 N.E. at 495 ("[A] broker who procures insurance which is accepted and issued by such an insurance company is the agent of such company, and may bind it by his acts and representations. . . . Insurance brokers so acting are agents of such companies for the purpose of . . . collecting or adjusting the premiums thereon.").

The Seventh Circuit has recognized in numerous opinions that it must follow the law of the state when sitting in diversity. *Fidelity and Guar. Ins. Underwriters, Inc. v. Everett I. Brown Co.*, 25 F.3d 484, 486 (7th Cir. 1994)(applying the law that would be applied if sitting in front of the Indiana Supreme Court); *Kutsugeras v. Avco Corp.*, 973 F.2d 1341, 1346 (7th Cir. 1992). The Court of Appeals was not free to impose its own view of what the state law should be; it must apply the law as interpreted by the state supreme court. *Colby*, 811 F.2d at 1123; *see also McKenna v. Pacific Rail Serv.*, 32 F.3d 820, 825 (3rd Cir. 1994). The appellate court, following Indiana law, should have found that Layden was the agent of Fidelity. Likewise, Tillman should not be held responsible for its insurance premiums once it delivered the checks to Layden. Regardless of whether the broker, Layden, submitted the application to the insurer directly or through a pool, Fidelity issued the policy in response to Layden's application.

Even if a court has reservations concerning the correctness or persuasiveness of a court opinion, a federal court sitting in diversity is bound to apply a rule established by the supreme court of that state. *State Farm Fire and Cas. Co. v. Miles*, 730 F. Supp. 1462, 1469-70 (S.D. Ind. 1990), *aff'd*, 930 F.2d 25 (7th Cir. 1991). The Indiana Supreme Court's rulings on this issue are consistent and unequivocal. If the Court of Appeals was reluctant to hold Fidelity liable, it could look to the handbook for sup-

port, but the court itself stated that the handbook was not a "rule with the force of law; it is only to say that it reflects a view that a federal court should respect." *Fidelity and Cas. Co. of New York v. Tillman Corp.*, 112 F.3d 302, 305 (7th Cir. 1997); A4–5. However, the appellate court did not have the authority to decide against the precedent when it chose to abandon long-standing Indiana case law and rely on a statement in an agency handbook. The court was not at liberty to reverse existing state precedent to uphold a brief statement made by the Bureau which does not even have the force of law.

The Seventh Circuit failed to appreciate the meaning of the Indiana law and failed to correctly apply it to the uncontroverted facts. As the Eighth Circuit eloquently noted, "a federal court in a diversity suit [is] not free to fashion rules of law from whole cloth." *Jackson v. Anchor Packing Co.*, 994 F.2d 1295, 1310 (8th Cir. 1993); *Curtis 1000 Inc. v. Youngblade*, 878 F. Supp. 1224, 1243 (N.D. Iowa 1995). The Court should reverse the opinion of the Seventh Circuit, for the rule in Indiana law is clear. "[T]he application for and issuance of an insurance policy establishes the broker as the agent of the insurer." *Benante*, 659 N.E.2d at 547.

B. To Avoid Forum Shopping, a Federal Court in Diversity Must Apply the Law of the State in Which it Sits.

If the Seventh Circuit is allowed to base its decisions on its own idea of what the state law should be, the court will create the evil of forum shopping, an evil *Erie* intended to forever abandon. Insurance companies and dishonest agents will rush to file a claim in federal court where they can take advantage of the *Tillman* decision. Likewise, the policyholders will hurry into state court relying on the long-standing precedent which relieves the insured from the responsibility of a dishonest agent. *See Erie*, 304 U.S. at 74.

The policy underlying *Erie* was that a party should receive the same result in federal court as it would receive if it crossed the street into state court. The Seventh Circuit stated:

> Where different outcomes would place the defendant under inconsistent legal duties, the case for the second court's not going into conflict with the first is particularly strong. A conflict would place the defendant in an impossible position unless the Supreme Court agreed to hear the case, which it might be reluctant to do if the conflicting decisions, however excruciating for the defendant, raised no issue of genuine significance. . . .

Colby, 811 F.2d at 1124. If this Court does not grant the Petition, Tillman will be punished for Fidelity's decision to enter federal court. The Court cannot allow the Seventh Circuit to begin applying its own rules of law no matter what the situation.

It is unfair to force Tillman to pay an additional $127,000 on top of the original $187,000 in premiums it already paid to Layden. Fidelity only paid out claims worth $74,000. *Erie* guarantees that if a person defends a state law cause of action in federal court, and abides by the rules of that court, the result will be the same regardless of the court. *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696, 706 (5th Cir. 1990), *aff'd*, 501 U.S. 32 (1991). Therefore, the Court should reverse the decision of the Seventh Circuit which holds Tillman liable for the insurance premiums Layden absconded. The Court should not punish Tillman for making its best efforts to comply with Indiana law.

II. THE CHEVRON DOCTRINE IS ENTIRELY INAPPLICABLE TO AN AGENCY POLICY CREATED WITHOUT FEDERAL OR STATE STATUTORY AUTHORITY.

The Seventh Circuit stated that it was "exceptionally reluctant" to decide against the policy set forth in the agency handbook which stated that an insurance agent in a state-assigned risk pool was not an agent of the insurer and was not responsible to the insured. *Tillman Corp.*, 112 F.3d at 305; A4. Even though this policy directly conflicted with the Indiana law, the Court of Appeals gave deference to the agency, citing the *Chevron* Doctrine. *Id.* It analogized the situation to that of a federal court reviewing a federal agency. The Court of Appeals then clarified its statement by noting that the Bureau's publication was not "a rule with the force of law." *Id.*

Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the Court established the guidelines for reviewing a federal agency's construction of a statute enacted by Congress. In interpreting an agency rule, a court must first determine whether Congress has directly spoken to the question at issue. If Congress has already spoken and the intent is clear, then the court looks only to the unambiguously expressed intent of Congress. *Id.* If Congress has not directly spoken to the question at issue, the court must look at whether Congress intended the agency to fill the gap in the legislation and whether the agency construction is a permissible interpretation of the statute.

The *Chevron* Doctrine is entirely inapplicable in this case since the Bureau was not relying on a federal statute for its authority in establish-

ing the policy. Actually, there is not even a state statute which a court could construe to give the agency power to enact such a policy. This case does not involve a question of statutory interpretation, but rather a simple interpretation of the existing case law. Therefore, the court has no reason to give any deference to the agency handbook when a well-settled body of case law already exists.

Since Tillman never received a copy of the Bureau's handbook, it was not on notice of its contents. No foundation was ever laid for this handbook. Moreover, there was no indication in the record that the Bureau even used the proper rule-making procedures for enacting the policy. *See Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 667 (7th Cir. 1995) (stating that the "degree of deference is tied not to the formality or elaborateness of the procedures used by the agency but to the character of the issue in relation to whatever procedures were employed to resolve it"). The handbook does not have the independent force of law because there is no apparent grant of statutory authority upon which the agency relied in producing the handbook. *Western Radio Serv. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 80, 136 L.Ed.2d 38 (1996) (finding that an agency manual and handbook does not have independent force of law).

It is unreasonable to believe such a statement would have greater weight than the unequivocal Indiana case law spanning from 1918 to 1995. In situations where statutory interpretation is at issue, this Court ruled:

> Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.

Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990). Although the interpretation of a statute is not at issue here, stare decisis should still apply to the Indiana case law and the court should construe the agency interpretation against existing law. Thus, the Bureau's later description of agency among insurance agents should not prevail over the Indiana Supreme Court's prior determinations and a court—especially a federal court sitting in diversity—should not and cannot give it greater weight than the case law.

A court need not even follow an agency's interpretation of its own regulations when there is a compelling indication that it is wrong. *United Fire Ins. Co. v. Commissioner of Internal Revenue*, 768 F.2d 164, 169 (7th Cir. 1985). Layden was clearly acting as the agent of Fidelity. He

played an instrumental role with Fidelity in issuing the policy to Tillman. Layden was in the business to procure insurance policies and in no way represented the interests of Tillman. Therefore, the description of Layden as Tillman's agent in the Bureau's handbook was wrong.

The Court of Appeals should not have granted any deference to the handbook, and thus keeping in line with unequivocal Indiana case law, this Court should reverse the Seventh Circuit decision, remand, and direct that judgment be entered in favor of Tillman.

CONCLUSION

Wherefore, for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Order of the United States District Court for the Northern District of Indiana, dated July 1, 1996 ..... A-7

In the
United States Court of Appeals
For the Seventh Circuit

No. 96-3216

THE FIDELITY & CASUALTY COMPANY OF NEW YORK,
Plaintiff-Appellee,

v.

TILLMAN CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No 2:93-CV-251—**Andrew P. Rodovich**, *Magistrate Judge*.

ARGUED February 10, 1997—DECIDED April 24, 1997

Before BAUER, EASTERBROOK, and DIANE P. WOOD,
Circuit Judges.

EASTERBROOK, *Circuit Judge*. When at the close of 1990 Jack Hubbard created Tillman Corporation to enter the construction business, he asked Elmer Layden to secure the necessary insurance. Through his insurance brokerage (Elmer Layden, Inc.) Layden obtained several liability policies for Tillman, but workers' compensation coverage was hard to come by. Layden submitted an application on Tillman's behalf to the Indiana Compensation Rating Bureau, which manages that state's assigned-risk pool. Tillman estimated that its payroll for 1991 would be $150,000, which under the state's rules required an advance payment of $3,303 for the year's coverage; the rules provided for an audit at year's end to determine the actual payroll, and thus the final premium. The Bureau assigned the risk to The Fidelity & Casualty Company of New York and issued a 30-day binder; within this month Fidelity issued an appropriate policy. Layden sent Tillman forms for computing how much the workers' compensation policy would cost. These came in handy, because Tillman's payroll exceeded $6 million through the end of its fiscal year on September 30, 1991. But instead of computing how much

it would owe in October and establishing a reserve, as it should have done, Tillman remitted some $187,000 to Layden, who stole all but $10,000 of this money. Today Layden is insolvent and imprisoned, and we must decide who bears the loss. Tillman argues that Layden was Fidelity's agent; Fidelity argues that he was Tillman's. A magistrate judge, who heard the case by consent under 28 U.S.C. § 636(c), granted summary judgment in favor of Fidelity and ordered Tillman to pay Fidelity some $130,000 (the balance of the correct premium), plus interest, for workers' compensation coverage between January and September 1991.

Tillman believes that Fidelity should have named Layden as a defendant, a step that would have precluded federal jurisdiction by spoiling complete diversity of citizenship. The magistrate judge correctly concluded that Layden is not an indispensable party. According to Fed. R. Civ. P. 19(a), a person should be joined as a party if "(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." Complete relief is possible between Tillman and Fidelity without Layden's presence. Tillman's argument proceeds along the lines of Rule 19(a)(2)(ii): it fears losing in the federal suit on the ground that Layden was its agent, and then in a state suit against Layden if the state court should conclude that Layden was Fidelity's agent. That sequence is unlikely: Layden lacks the assets to pay a judgment and is not apt to acquire them later (his expertise in the insurance business has been rendered worthless by the nature of his crime), so as a practical matter no one is going to sue him. Layden owes either Fidelity or Tillman; the problem is not that he asserts a legal right to keep the money, but that he does not have the money. If Fidelity prevails in this case, and Layden miraculously becomes solvent yet perversely pays Fidelity, then Fidelity will have an obligation under the law of restitution to relay that second payment to Tillman. Rule 19(b) provides the court with discretion to proceed without Layden, given that his presence would destroy federal jurisdiction. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 122 (1968). This is an appropriate case in which to exercise that power and get on with decision between the two real contestants.

Tillman's argument on the merits is straightforward. Indiana has a simple rule. An intermediary in the insurance business is the agent of the

insured while shopping for a policy, and the agent of the insurer after a policy issues. See *Benante v. United Pacific Life Insurance Co.*, 659 N.E.2d 545, 547 (Ind. 1995); *Aetna Insurance Co. v. Rodriguez*, 517 N.E.2d 386 (Ind. 1988); *Stockberger v. Meridian Mutual Insurance Co.*, 395 N.E.2d 1272, 1278-79 (Ind. App. 1979). Tillman remitted premiums to Layden after Fidelity issued its policy; therefore, Tillman concludes, Layden received the money as Fidelity's agent, and the loss from Layden's dishonesty falls on Fidelity. The problem with this approach, however, is that Indiana's cases all arise from situations in which the intermediary applied for a policy, which the insurer agreed to issue. Fidelity did not agree to any proposal from Layden—and Indiana's rule does not cover strangers to whom insureds choose to remit money. Suppose that, after Fidelity issued its policy, Tillman had sent $187,000 to John Gotti, who stole the cash. Surely Tillman could not say that its decision to pay Gotti made Gotti Fidelity's agent. Agency is a voluntary relation. Indiana's rationale for treating intermediaries as agents of the insurers is that the insurers can decide with whom to deal. Carriers may demand that would-be agents establish their trustworthiness, and may set conditions—fidelity bonds, audits of the books, compensation for risk bearing—to protect themselves. Insurers are best situated to monitor intermediaries through which they choose to deal, and therefore bear the risk of loss.

Insurers cannot do any of these things for workers' compensation policies placed through Indiana's assigned-risk pool. Indiana calls an intermediary through which an employer approaches the Bureau a "producer", to distinguish this intermediary from an agent. According to the *Indiana Workers Compensation Insurance Plan: Information and Procedures* (Indiana Compensation Rating Bureau 1989-92), a "producer is the licensed Indiana agent who may assist the employer in making application to the Plan and in continuing coverage under the Plan in accordance with the rules and procedures." An employer or its chosen producer submits an application to the Plan, after which the Bureau, not the producer, selects a carrier to bear the risk. The selected carrier *must* insure the employer unless it can persuade the Bureau that the employer "knowingly refuses to meet reasonable health and safety requirements." "All risks assigned under this Plan shall be written at the classifications and rates established by the Indiana Compensation Rating Bureau." So the insurer cannot choose its customers or set its rates; what is more, because the employer selects the producer, the carrier has no control over the producer's identity and practices. It cannot refuse to deal with producers that lack fidelity bonds and do not hold premiums in escrow

accounts, to name only two obvious precautions. A carrier's lack of any influence over the identity and practices of the producer has another consequence, hinted at in the passage above defining the producer as an "agent who may assist the employer" and made explicit in an emphasized passage of the Bureau's publication:

> Important note to the producer: Remember, although you have an important role under the Plan, you are not a contract agent or agency of the servicing carrier. You have no authority from the servicing carrier to bind or cancel coverage or to otherwise act within such agency relationship. Unless a legal finance agreement exists which assigns cancellation or premium refund collection rights to a third party, all premium transactions are strictly between the servicing carrier and the employer as a policyholder and you are not a party to that contract. A servicing carrier may give you certain authority, such as permission to issue certificates of insurance, but such rights are not to be routinely assumed by a producer.

Fidelity issued its policy directly to Tillman, so as servicing carrier it did not give Layden the type of authority to which the final sentence refers. Fidelity did not select or approve Layden for any other purpose, either; it never voluntarily issued any policy through his firm.

No case decided by an Indiana court holds, or even hints, that a "producer" in an assigned-risk situation is the carrier's agent for the purpose of receiving premiums—something the producer is not supposed to do at all. Only one case in any other state addresses the question. Louisiana treats the intermediary as the insurer's agent, although under a system so different from Indiana's that the decision is not illuminating. *DeSoto Parish School Board v. Insurance Co. of North America*, 572 So.2d 310 (La. App. 1990). Given the silence of Indiana's judiciary, the most authoritative word we have on the subject is the Bureau's publication, which proclaims that the producer is the employer's agent—for only the employer has any power to select or monitor the producer. We are exceptionally reluctant to go against this administrative understanding of Indiana law. A federal court dealing with a federal agency would respect the agency's view under the *Chevron* doctrine; at least that degree of respect is appropriate when principles of federalism are in play. See *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1073 (1997); *Frisby v. Schultz*, 487 U.S. 474, 482 (1988); *Eakin v. Continental Illinois National Bank*, 875 F. 2d 114, 117 (7th Cir. 1989). This is not at all to say that the Bureau's publication is a rule with the force of law; it is only to say that it reflects a view that a federal court should respect.

Although we are confident that Indiana would not treat "producers" in the workers' compensation assigned-risk pool as automatic agents of the selected carriers, the possibility remains that Fidelity might have made Layden its agent for this particular transaction. Tillman observes that Indiana uses a multi-factor balancing approach for the ordinary determination of agency, *Benante*, 659 N.E.2d at 548, which it invokes to support a fallback position that it is entitled to a trial. Exhibit One in Tillman's list of important facts is that Fidelity paid Layden a commission. Yet this hardly shows that Fidelity made Layden its agent; Fidelity was legally required to pay the producer. Here is what the Bureau's publication says: "The carrier shall pay a fee to the producer designated by the employer on new and renewal policies . . . The fee shall be based upon the state standard premium and paid at the rate of eight percent on the first one thousand dollars of premium, five percent upon the next four thousand dollars of premium, three percent on the next ninety-five thousand dollars of premium and two percent on premium in excess of one hundred thousand dollars." A carrier's compliance with this obligation—articulated in the same publication that declares the producer an agent of the employer—cannot logically adopt the producer as the carrier's agent. Payment is involuntary. Exhibit Two is slightly more suggestive. Tillman says that Layden sent it worksheets for calculating premiums, and that these worksheets bore the name "Fidelity." Where did they come from, except from Fidelity, Tillman wonders, and how could Layden have obtained them without being Fidelity's agent? Fidelity denies that it furnished worksheets to Layden, but let us suppose that Tillman could prove that it did. How could this support an inference of agency? Worksheets help the employer to calculate its obligation, but they do not invite immediate payment through the producer. Both the Bureau's publication and the policy call for payment to the carrier at the end of the year. A carrier may provide documents for its insured without appointing as its agents all those through whose hands the documents pass. Remember that the question in this case is whether Fidelity made Layden its agent *for the purpose of receiving premiums*. Nothing in the worksheets would imply to a reasonable reader that premiums were due before the end of the fiscal year, let alone that Fidelity had agreed to accept payment through Layden.

Whether Fidelity supplied worksheets bearing its name to Layden is the only disputed issue of fact, and we do not think the dispute legally material. Other propositions of fact, undisputed on this record, are similarly unhelpful to Tillman. Tillman sent checks to Layden; Layden told Tillman that he was accepting the money on Fidelity's behalf; Layden

told Fidelity that Tillman's big construction project was winding down, so it was time for an audit. Layden cannot appoint himself as Fidelity's agent; only what Fidelity did matters. It issued the policy and paid the claims made by Tillman's workers; both of these steps were legally required by Indiana law and did not make Layden its agent for purposes of receiving premiums. There are no material disputed issues, nothing to undercut the undisputed facts that Fidelity did not choose Layden, could not have rejected Layden, and did not instruct Tillman to remit premiums to Layden. Tillman brought this problem on itself by unnecessarily sending large sums of money to a crook. It must bear the loss.

AFFIRMED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

THE FIDELITY & CASUALTY COMPANY OF NEW YORK,	)	
Plaintiff,	)	
v.	)	Case No. 2:93 cv 251
TILLMAN CORPORATION,	)	
Defendant.	)	

ORDER

This matter is before the court on the Motions for Summary Judgment filed by the plaintiff, The Fidelity & Casualty Company of New York, and the defendant, Tillman Corporation, on March 3, 1995. For the reasons set forth below, the motion of Tillman Corporation is **DENIED,** and the motion of The Fidelity & Casualty Company of New York is **GRANTED.**

Background

In December, 1990, Jack Hubbard, president of the now defunct Tillman Corporation, contacted Elmer Layden of Elmer Layden, Inc. to procure insurance for Tillman. Layden assisted Tillman in obtaining the necessary business insurance policies. Different companies provided insurance coverage for general commercial liability, premises liability, umbrella coverage, and worker's compensation. Layden prepared an application for worker's compensation insurance and submitted the application to the Indiana Compensation Rating Bureau. The application was dated December 27, 1990, and was signed by both Tillman and Layden. Tillman listed an estimated payroll for 1991 of $150,000 on the application. This estimate resulted in an initial premium of $3,303 which was submitted with the application to the Bureau. Because the estimated premium was under $5,000, Tillman was required to pay it in advance,

subject to an audit of Tillman's total payroll at the end of the year. No additional payments were required during the coverage term.

On January 15, 1991, the Bureau sent Tillman a Worker's Compensation and Employer's Liability Policy Binder. The Bureau assigned The Fidelity and Casualty Company of New York as the insurer and forwarded the $3,303 premium to Fidelity. On February 7, 1991, Fidelity issued a commission check in the amount of $194.88 to Layden, Inc. Although Layden, Inc. had agency agreements with several insurance companies, it had no previous business dealings, nor any agency agreement, with Fidelity.

Tillman began making advance payments to Layden, Inc. when Hubbard realized that he had underestimated the 1991 payroll. Hubbard believed that Layden would send the payments to Fidelity as advance payments on the worker's compensation insurance. Neither Tillman nor Layden, Inc. ever received a bill or a request for premium payments from Fidelity. No premium payments were calculated by or owed to Fidelity until the end-of-the-year audit. From March, 1991 to July, 1991, Tillman paid Layden, Inc. weekly or bi-weekly installments totaling $187,000. On each check, Tillman wrote that the money was for payment of the worker's compensation premium. Layden deposited these checks into the Layden, Inc. bank account. Of the $187,000 Tillman paid to Layden, Inc., only $9,946 was forwarded to Fidelity.

From January, 1991 through September, 1991, Tillman submitted 113 worker's compensation claims incurred by its employees to Fidelity for review and payment. Fidelity paid each of the claims totaling approximately $74,000. In February of 1992, Tillman submitted to Fidelity a voluntary audit of its payroll showing a total payroll of over $6,000,000 for the period of January 2, 1991 through September 30, 1991, compared to the $150,000 estimated payroll for the year. This resulted in a total premium owed of $140,618. Fidelity issued a statement of the adjusted premium to Tillman and requested payment. Accounting for the initial premium of $3,303 paid to Fidelity and the payment of $9,946 which was submitted by Layden, Inc. to Fidelity, a remaining premium balance of $127,369 is owed to Fidelity.

Tillman does not dispute the premium calculations claimed by Fidelity. However, Tillman argues that Layden, Inc. was acting as an agent of Fidelity. Therefore, Tillman contends that it fulfilled its obligations to Fidelity by remitting all of the required premium payments to Layden, Inc. and that it is entitled to summary judgment in its favor. Tillman contends that an agency relationship between Layden, Inc. and Fidelity

was established because Fidelity issued a policy to Tillman based on Layden, Inc.'s application; Fidelity paid Layden, Inc. an agent's commission for procuring the worker's compensation policy issued to Tillman; Tillman computed its estimated advance premium payments on a Fidelity worksheet; Tillman wrote on each check that the funds were for payment of the worker's compensation premiums; Layden told Tillman that he was accepting Tillman's payments on behalf of Fidelity and would convey them to Fidelity; and Fidelity paid all of the worker's compensation claims.

Fidelity argues that there was no agency relationship between it and Layden, Inc. and that Layden, Inc. was acting as Tillman's agent. Fidelity further contends that because Tillman does not contest that Fidelity did not receive the premium payments from Layden, Inc., Fidelity is owed the remaining premium balance from Tillman and is entitled to summary judgment in its favor. Fidelity maintains that Layden, Inc. was Tillman's agent because the worker's compensation insurance policy was issued by the Bureau and not Fidelity; Layden, Inc. had no authority to collect premiums from Tillman; no premium payments were requested or owed during the policy period; Tillman never contacted Fidelity about premium payments; Fidelity paid Tillman's worker's compensation claims in accordance with the policy issued which only required the initial premium of $3,303; and the Indiana Worker's Compensation Insurance Plan Guide established the relationship between the parties and states that the producer (Layden, Inc.) is not an agent of the insurer (Fidelity).

Discussion

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper only if it is demonstrated "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Kennedy v. Children's Service Society of Wisconsin,* 17 F.3d 980, 983 (7th Cir. 1994); *Dempsey v Atchison, Topeka and Santa Fe Railway Company,* 16 F.3d 832, 836 (7th Cir. 1994); *Southmark Corporation v. Cagan,* 999 F. 2d 216, 223 (7th Cir. 1993). The burden is upon the moving party to establish that no material facts are in genuine dispute, and any doubt as to the existence of a genuine issue must be resolved against the moving party. *Adickes v S.H. Kress & Co.,* 398 U.S. 144, 160, 90 S. Ct. 1598, 1610, 26 L. Ed. 2d 142, 155 (1970); *Green v. Whiteco Industries, Inc.,* 17 F.3d 199, 201 (7th Cir. 1994); *Dahnke v. Teamsters Local 695,* 906 F. 2d 1192, 1195 (7th Cir. 1990). A fact is material if it is outcome determinative under applicable law. *Derrico v. Bungel International Manufacturing Company,* 989 F. 2d 247, 250 (7th

Cir. 1993); *Marshall v. Allen,* 984 F. 2d 787, 789 (7th Cir. 1993); *First Indiana Bank v. Baker,* 957 F. 2d 506, 508 (7th Cir. 1992). Even if the facts are not in dispute, summary judgment is inappropriate when the information before the court reveals a good faith dispute as to inferences to be drawn from those facts. *Lawshe v. Simpson,* 16 F.3d 1475, 1478 (7th Cir. 1994); *Dempsey,* 16 F.3d at 836; *Fleischfresser v. Directors of School District 200,* 15 F.3d 680, 685 (7th Cir. 1994). Finally, summary judgment generally is not an appropriate means of resolving questions of motive and intent. *Roger v. Yellow Freight Systems, Inc.,* 21 F.3d 146, 148 (7th Cir. 1994); *Hong v. Children's Memorial Hospital,* 993 F. 2d 1257, 1261 (7th Cir. 1993); *Lac Du Flambeau Indians v. Stop Treaty Abuse-Wisconsin. Inc.,* 991 F. 2d 1249, 1258 (7th Cir. 1993); *United Association of Black Landscapers v. City of Milwaukee,* 916 F. 2d 1261, 1268 (7th Cir. 1990).

In deciding a motion for summary judgment, the trial court must determine whether the evidence presented by the party opposed to the summary judgment is such that a reasonable jury might find in favor of that party after a trial.

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.
>
> [T]his standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.
>
> *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).

See also: Celotex Corporation v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265, 273 (1986); *Kennedy,* 17 F.3d at 983; *Essex Insurance Company v. Stage 2, Incorporated,* 14 F.3d 1178, 1181 (7th Cir. 1994); *Derrico,* 989 F. 2d at 249.

One procedural issue must be discussed before the motions are addressed on the merits. Federal Rule of Civil Procedure 8(c) provides in part:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, . . . estoppel, . . . payment, . . . and any other matter constituting an avoidance or affirmative defense. . . .

In its Answer filed on March 3, 1994, Tillman raises the affirmative defenses of payment, estoppel, accord and satisfaction, and failure to join a necessary party. Tillman has the burden of proof on its affirmative defenses. *See generally Mominee v. Kina,* 629 N.E.2d 1280, 1282 (Ind. App. 1994).

An insurance agent who operate an independent insurance agency and represents several insurance companies is considered a broker and generally in deemed to be an agent of the insured and not the insurance company. *City of Lawrence v. Western World Insurance Company, Inc.,* 626 N.E.2d 477, 480 (Ind. App. 1993); *Callis v. State Automobile Insurance Company,* 579 N.E.2d 129, 131 (Ind. App 1991); *Stockberger v. Meridian Mutual Insurance Company,* 395 N.E.2d 1272, 1278 (Ind. App. 1979). Because the broker is not the agent of the insurance company, the insurance company is not liable for the tortious conduct of the broker. *City of Lawrence,* 626 N.E.2d at 480; *Callis,* 579 N.E.2d at 131. Under Indiana law, when the broker makes an application for insurance and the insurance policy has been issued, the broker becomes the agent of the insurance company and can bind it within the scope of his authority. *Aetna Insurance Company of the Midwest v. Rodriquez,* 517 N.E.2d 386, 388 (Ind. 1988). *See also Callis,* 579 N.E.2d at 131.

The Indiana Supreme Court recently addressed the relationship between an insurance company and an independent insurance agency in *Benante v. United Pacific Life Insurance Company,* 659 N.E.2d 545 (Ind. 1995):

> Our opinion in *Aetna Ins. Co.* clearly stands for the proposition that the application for and issuance of an insurance policy establishes the broker as the agent of the insurer, 517 N.E.2d at 388; it does not hold that a broker for several insurance companies can never be the agent of one in the absence of the issuance of a policy. Although the general rule reflects that it is usually the case that a person who represents several insurance companies is not an agent for one particular company, there is no fixed rule that precludes that person from being considered an agent of a particular company. *See* 16 John A. Appleman & Jean A. Appleman, *Insurance Law in Practice* § 8725 at 333-34 (1981) ("A person may be both an agent and a broker, and at different times act in different capacities, sometimes representing the applicant for insurance and at other times, acting for the insurance company.")
>
> 659 N.E.2d at 547.

The determination of whether an insurance salesman is an agent of the insurance company is fact sensitive. In *Benante,* the Indiana Supreme Court reversed the decision of the appellate court, and in so doing, agreed with the dissenting opinion authored by Judge Robert D. Rucker.

> In determining whether one is a broker or an agent, it is necessary to consider the facts and circumstance of the case, the relation of the parties, their actions, their usual course of dealing, any instructions given to the person by the company, the conduct of the parties generally, and the nature of the transaction. Facts evidencing an agency relationship include the presence of the company's sign in the agent's office, use of the company's stationery, and use of preprinted application forms bearing the company's name. (citations omitted)
>
> *Benante v. United Pacific Life Insurance Company,* 639 N.E.2d 375, 379 (Inc. App. 994) , (dissenting opinion)

See also Benante, 659 N.E.2d at 548.

In the instant case, Tillman has failed to prove that Layden, Inc. was the agent of Fidelity. Tillman was a new corporation and was preparing to work on its first construction project. Hubbard approached Layden to obtain all of the necessary business insurance, and Layden obtained coverage from several different companies. It is clear that at the inception of the relationship, Layden was acting solely on behalf of Tillman.

> In ordinary commercial practice, it is usually clear that a broker's first contact with a potential insured is as an agent of that potential insured. Once the potential insured has stated his or her needs and desires as to insurance, however, the allegiance of a broker is less clearcut. In addition to possibly having longstanding commercial relationships with various insurance companies, the broker may be used by insurers as a conduit for passing information to the insured, as a collector of premiums, and sometimes as the initial investigator or administrator of claims filed by the insured. (footnote omitted)
>
> *Couch on Insurance 3D,* § 45:3 at p. 45-7

See also Black v. Illinois Fair Plan Association, 409 N.E.2d 549, 551-52 (Ill. App. 1980).

In order to obtain worker's compensation insurance for Tillman, Layden submitted an application to the Indiana Compensation Rating Bureau. Based upon the information provided in the application, it was determined that the initial premium was $3,303. Tillman paid this pre-

mium by sending a check to the Bureau. Under its procedures, the Bureau selected Fidelity to issue the worker's compensation policy and forwarded the premium check to Fidelity. Before the worker's compensation policy was issued to Tillman, Layden, Inc. had not had any business dealings with Fidelity. Therefore, Tillman was not influenced by "the presence of the company's sign in the agent's office, use of the company's stationery, and use of preprinted application forms bearing the company's name." *Benante,* 639 N.E.2d at 379.

When Tillman submitted its application to the Bureau, it received a copy of a brochure entitled Indiana Worker's Compensation Insurance Plan (Handbook). The Handbook contained a section entitled "Definitions of Key Terms" which defined "Agency and Producer" as follows:

> The producer is the licensed Indiana agent who may assist the employer in making application to the Plan and in continuing coverage under the Plan in accordance with the rules and procedures. The term "agency" will be used to identify the firm which employs the licensed producer. . . .
>
> Handbook, Preface, p. vii.

The Handbook also contained the following paragraph entitled "Important note to producer":

> Remember, although you have a very important role under the Plan, you are not a contract agent or agency of the servicing carrier. You have no authority from the servicing carrier to bind or cancel coverage or to otherwise act within such an agency relationship. Unless a legal finance agreement exists which assigns cancellation or premium refund collection rights to a third party, all premium transactions are strictly between the servicing carrier and the employer as a policyholder and you are not a party to that contract. A servicing carrier may give you certain authority, such as permission to use certificates of insurance, but such rights are not to be routinely assumed by a producer. Read this handbook carefully, and if you still have a question about your authority, then contact the Bureau or the servicing carrier.
>
> Handbook, Section 1, p. 1-2.

Under the terms of the Handbook, both Tillman and Layden, Inc. were on notice that Layden, Inc. was not the agent for Fidelity. In fact, Tillman specifically was notified that all premiums should be paid to Fidelity. This notification was consistent with the application which speci-

fied that Fidelity would conduct a payroll audit at the end of the insurance term.

Although Layden, Inc. was not the agent of Fidelity when the policy was issued, that does not preclude a finding of agency at a later date.

> Nor is a broker necessarily the agent of either the insured or the insurer throughout an entire "insurance relationship." He or she may be the agent of one in some of the matters involved and of the other in the remainder. He may, for a particular thing, be the agent of the insured or of the insurer, or of both, depending upon the thing he or she is doing, and usually depending on which party requested or employed him or her to do the particular thing. (footnotes omitted)
>
> *Couch on Insurance 3D*, § 45:3 at p. 45-8.

Therefore, it is necessary to examine the course of dealings after the policy was issued.

The initial premium was based upon Tillman's estimate that its annual payroll would be $150,000. The policy was effective from January 2, 1991 through September 30, 1991. Under the terms of the policy, Fidelity reserved the right to audit Tillman's payroll records after September 30 to determine whether it was entitled to additional premiums. Nothing in the policy required Tillman to make additional payments during the effective dates of the policy.

The initial payroll estimate was grossly inadequate. The actual payroll during the effective dates of the policy was $6,000,000. In order to avoid a substantial premium payment at the end of the policy, Tillman began making regular payments to Layden, Inc. In order to determine the amount of the periodic payments, Tillman used Fidelity work sheets which it obtained from Layden. Layden also indicated that he would forward the installment payments to Fidelity.

The evidence does not establish that Layden, Inc. became the agent of Fidelity during the term of the worker's compensation policy. Other than sending a small portion of the premiums to Fidelity, $9,946 from the $187,000 collected, Tillman has failed to identify any other contacts between Layden, Inc. and Fidelity which would establish an agency relationship. Although the Fidelity work sheets are one factor which can be considered in determining whether the agency relationship existed, it is not sufficient by itself to meet Tillman's burden of proof.

This case is similar to *Libby v. Concord General Mutual Insurance Company*, 452 A.2d 979 (Maine, 1982). In that case, the injured was not

able to obtain automobile insurance on the open market. The insured then contacted an independent agent who filed an application with a state agency similar to the Indiana Compensation Rating Bureau. That agency assigned the insurance policy to Concord General. The court summarized the subsequent dealings between the insured and the insurance broker:

> From the initial application, [the broker's] contacts with Concord on behalf of [the insured] were few: at the time of application, [the broker] did tell [the insured] to contact him if any problems arose. [The insured] recalled making all his payments to [the broker], who in turn took a commission on the sale. Concord sent [the broker] "courtesy" copies of major correspondence between it and [the insured]. Shortly after the application was made, [the broker], at [the insured's] request, forwarded a statement to Concord concerning damage to a "Prentiss Loader" of [the insured's], for which [the insured] was eventually paid by Concord. [The broker's] only involvement in the processing of the claim, however, was the initial notification to the company at [the insured's] request. In April, 1979, also at [the insured's] request, [the broker] wrote to Concord asking that they add a new pick-up truck to the existing policy and that they forward a claim form so that [the insured] could report the damage to his loader. The report of loss was acknowledged by letter to [the insured].
>
> 452 A.2d at 981.

After the insured was involved in a traffic accident with the plaintiff, a notice of the pending lawsuit was sent to the broker. The plaintiff obtained a default judgment against the insured and then attempted to collect on the insurance policy. In determining that the broker was not an agent for Concord and that Concord had not received notification of the lawsuit, the court stated:

> The only communications which Concord is said to have initiated with [the broker] were the routinely sent copies of various correspondence sent to [the insured], and the claim form which [the broker] had requested. Aside from these communications, Concord dealt directly with [the insured]. There is no additional evidence that Concord acted so as to indicate to [the broker] that he was its agent, much less responsible for notifying it of pending legal actions.
>
> 452 A.2d at 982

In conclusion, the court noted that the application submitted to the state agency also indicated that the broker was not acting as an agent for any insurance company.

In its briefs, Tillman has raised two arguments which relate to its affirmative defenses. First, Tillman contends that Layden, Inc. had the apparent authority to act as the agent for Fidelity. Second, Tillman claims that Fidelity is estopped from denying that Layden, Inc. was its agent.

The apparent authority argument fails both legally and factually. In determining whether Layden, Inc. had the apparent authority to bind Fidelity, the focus must be on the conduct of Fidelity, not Layden. In *Pepkowski v. Life of Indiana Insurance Company,* 535 N.E.2d 1164 (Ind. 1989), the court stated:

> Apparent authority in the authority that a third person reasonably believes an agent to possess because of some manifestation from his principal. The necessary manifestation is one made by the principal to a third party, who in turn is instilled with a reasonable belief that another individual is an agent of the principal. It is essential that there be some form of communication, direct or indirect, by the principal, which instills a reasonable belief in the mind of the third party. Statements or manifestations made by the agent are not sufficient to create an apparent agency relationship. (citations omitted)
>
> 535 N.E.2d at 1166-67.

See also Couch on Insurance 3D, § 48:12, p. 48-18, §48:12, p. 48-25 ("apparent authority to bind an insurer must be conferred by the actions of the insurer, intentionally or by lack of ordinary care, which would induce third persons to believe that agent had authority"). *Cf. Joyner v. Harleysville Insurance Company,* 574 A.2d 664, 669 (Penn. 1990).

Other than the worksheet, Tillman has not presented any evidence that Fidelity represented Layden, Inc. to be its agent. However, the worksheets by themselves are not sufficient to establish apparent authority. Tillman was aware that the policy was obtained through the Bureau and not by Layden, Inc. directly from Fidelity. Tillman also was provided with a copy of the Handbook which clearly stated that Layden, Inc. was not the agent of Fidelity. Under all of the circumstances, Tillman has failed to prove that Layden, Inc. had the apparent authority to bind Fidelity.

Even assuming the conduct of Layden can establish apparent authority, Tillman has not presented any evidence which supports this argument. Hubbard was questioned extensively about his conversations

with Layden in his deposition. Although Layden indicated that he would forward the premiums to Fidelity, he never specifically told Hubbard he was acting as Fidelity's agent.

Q: What did he tell you to do? What did he tell you about making premium payments?

A: He told me that the original application had been set up on an annual basis, and I told him that I wanted him—that I wanted to make the payments as we collected the money.

Q: Collected the money from Voest Alpine?

A: Yes. And he agreed to do that on behalf of Fidelity & Casualty.

Q.: Do you know whether he discussed that procedure with Fidelity & Casualty, that he would be receiving your premium payments?

A: No, I do not know that.

Hubbard deposition, p. 42.

Q: I think you told me he was the sole contact, that he functioned as the agent. What I am interested in is what you know or what you have seen that would—that told you or suggested to you that Elmer was an agent of Fidelity.

Did he tell you, "I am an agent of Fidelity."

A: Well, he told me he would collect the premiums on behalf of Fidelity & Casualty.

Q: My question is: Did he tell you—

A: He told me—

Q: —that he was an agent of Fidelity?

* * *

A: Well, it seemed to me—When I asked him about how he got paid, he told me he would be paid directly from Fidelity & Casualty, so that seemed to be an agency issue to me.

Q: I understand that. But my question is: Did Elmer Layden tell you, "I am an agent of Fidelity & Casualty Company."

A: He told me he would collect the premiums on behalf of Fidelity & Casualty.

* * *

Mr. Miller:

His question is specifically, Did Elmer ever use the word: quote, unquote: agent?

Witness:

I don't recall.

Hubbard deposition, pp. 44-45.

Even if apparent authority could be established through the putative agent, Tillman has failed to present any evidence that Layden represented himself as the agent of Fidelity.

The estoppel argument fails for similar reasons.

> The doctrine by which an insurer is held liable for the acts of an agent within the apparent scope of his or her authority is based on estoppel; having permitted his or her agent to appear to have a given authority, the insurer is estopped to deny such authority. To raise such estoppel it is necessary that the insured or other person asserting it acted justifiably and in good faith, upon an appearance of authority with which the principal has clothed the agent, by some word, act, or neglect, whether intentionally or by want of ordinary care, and the third party in reliance thereon must have been misled into asserting his or her position to his or her prejudice. (footnotes omitted)
>
> *Couch on Insurance 3D*, § 48:13, pp. 48-21 to 48-23.

The Indiana Supreme Court reached the same conclusion in *Pepkowski:*

> The doctrine of estoppel springs from equitable principals, and is designed to aid the law in the administration of justice where, without its aid, injustice might result. Its purpose is to preserve rights previously acquired, and not to create new ones.
>
> 535 N.E.2d at 1167

Once again, Tillman is left with the worksheets as the only evidence of any affirmative conduct by Fidelity. When balanced with all of the other evidence in the case, that is insufficient to support an estoppel claim. Because no payments were due until after the scheduled payroll audit, Fidelity had no reason to believe that Layden was collecting interim premiums. Fidelity honored its obligations under the policy by paying worker's compensation benefits, but those claims were unrelated to the question of when the premiums were due.

Tillman understandably feels that it should not be required to pay twice for the worker's compensation insurance. But between Tillman and Fidelity, Tillman was in the better position to guard against any

misconduct by Layden. Tillman hired Layden, Inc. as its insurance agency, and Layden, Inc. obtained insurance directly from several different companies. Layden, Inc. did not obtain the worker's compensation policy directly from Fidelity and did not tender the premium to Fidelity. Layden, Inc. had not obtained insurance from Fidelity before it was selected by the Bureau, and there is no evidence that Layden, Inc. ever dealt with Fidelity except for the Tillman policy. Under all of the circumstances, Tillman has failed to demonstrate that Layden, Inc. was the agent for Fidelity.

For the foregoing reasons, the Motion for Summary Judgment filed by the plaintiff, Fidelity & Casualty Company of New York, on March 3, 1995, is **GRANTED.** The Motion for Summary Judgment filed by the defendant, Tillman Corporation, on March 3, 1995, is **DENIED.** Fidelity in **ORDERED** to file a proposed judgment by July 15, 1996, which includes a sum certain reflecting the unpaid premiums plus prejudgment interest. Tillman is granted until July 31, 1996, in which to file any objections to those calculations.

ENTERED this 1st day of July, 1996.

Andrew P. Rodovich
United States Magistrate Judge